

ORIGINAL
702-0076
FILED

STATE OF ILLINOIS
SEVENTH JUDICIAL CIRCUIT
SANGAMON COUNTY, ILLINOIS

AUG 26 2002 CTR.-9

NORFOLK SOUTHERN RAILWAY
COMPANY,

Plaintiff,

vs.

ILLINOIS COMMERCE COMMISSION,

Defendant.

Anthony P. Schuch
Clark of the
Circuit Court

NO. 002CH 00397

RECEIVED
AUG 27 2002

Illinois Commerce Commission
RAIL SAFETY SECTION

**COMPLAINT FOR TEMPORARY, PRELIMINARY AND
PERMANENT INJUNCTIVE RELIEF**

Now comes plaintiff, Norfolk Southern Railway Company (hereinafter, "Norfolk Southern"), through the attorneys of Gundlach, Lee, Eggmann, Boyle and Roessler, seeking temporary, preliminary and permanent injunctive relief in order to prevent a violation of their due process rights under the Constitution of the State of Illinois and the Constitution of the United States of America.

Plaintiff states:

ALLEGATIONS COMMON TO COUNTS I THROUGH VI, INCLUSIVE

1. This Court has jurisdiction to hear claims for relief based on violations of rights protected by the Constitution of the State of Illinois, and by the Constitution of the United States of America.

2. Norfolk Southern is not required to exhaust administrative remedies, because they are challenging a regulation on its face as being unconstitutional, because seeking relief in front of the Commission would be patently useless, and because forcing them to submit to a biased decision maker constitute an irreparable harm, requiring injunction before the hearing.

DOCKETED

3. On August 12th, 2002 Norfolk Southern received by mail a citation from the Illinois Commerce Commission to show cause why the company has not complied with the requirements of 92 Illinois Administrative Code Part 1535.205, which requires "Every Railroad shall keep its right-of-way adjacent to tracks reasonably clear of brush, shrubbery, trees, weeds, crops, and all unnecessary permanent obstructions such as unauthorized signs and billboards for a distance of at least 500 feet each way from every grade crossing where such things would materially obscure view of approaching trains to travelers on the highway." The show cause hearing was set for August 28th, 2002.

4. The citation was for crossing of Stanford Road/TR444 (DOT 724 758R) located in the Weber Road District in Jefferson County, Illinois. This crossing was the site of an incident on July 9, 2002, in which 5 people died, and in which one person was injured.

5. Prior to the aforementioned incident, the Illinois Commerce Commission was given an official written request to examine the crossing and pursue any necessary action at the site to improve safety. Upon information and belief, the subject crossing was examined and studied over a period of approximately three years by the Illinois Commerce Commission and no action was recommended.

6. Norfolk Southern has a clearly protectable property interest in not being assessed penalties, especially a penalty undefined by statute.

7. Norfolk Southern's due process rights as protected by the Illinois Constitution and the Constitution of the United States are clearly ascertainable rights deeming protection.

8. There is no adequate remedy at law because it is established that a party is entitled

to an unbiased decision maker at the first instance and review by a court does not remedy the initial violation.

9. There is no adequate remedy at law where plaintiff would be forced to submit to a hearing on the basis of a regulation that is unconstitutionally vague, because plaintiff would not be able to adequately defend itself. Plaintiff is uncertain what specifications it was supposed to meet, and that determination is left to the ICC who will serve as judge, jury and prosecutor.

10. Because of the media coverage, a finding by the Commission, on the basis of an unconstitutionally vague regulation, will be broadcast to potential jurors statewide. This finding will result in irreparable harm to Norfolk Southern. Even if a court were to reverse the ruling at a later date, that would not repair the damage.

11. The balance of the equities clearly favors the granting of injunction until the constitutionality of the regulation is determined. As discussed above, Norfolk Southern will be irreparably harmed by proceeding with the hearing, and will have to through the cost and trouble of defending itself from a regulation that will likely be determined to be unconstitutional. The Commission will only be prejudiced in that it will be delayed in proceeding with its hearing until the constitutionality of the regulation is determined.

12. Requiring Norfolk Southern to submit to a hearing in front of a biased decision maker, based on a regulation that is unconstitutionally vague, without adequate time to prepare a defense, would constitute an irreparable harm to Norfolk Southern and determination that the hearing would be conducted by a biased decision maker is likely, if not patent.

13. Further, Norfolk Southern has a clearly protectable interest in not being assessed criminal or civil penalties on the basis of a vague and therefore void regulation to be decided by a biased decision maker, without the right to a trial by jury.

COUNT I

Requiring Norfolk Southern to submit to the show cause hearing as noticed by the Illinois Commerce Commission constitutes a violation of Norfolk Southern's Due Process Rights as protected by the 14th Amendment of the United States Constitution.

1. Norfolk Southern repeats and realleges allegations common to all Counts, paragraphs 1 through 13, as though fully set forth herein.

14. Requiring Norfolk Southern to submit to a show cause hearing in front of the Illinois Commerce Commission would violate Norfolk Southern's Due Process Rights as protected by the 14th Amended of the United States Constitution because the Illinois Commerce Commission is a biased decision maker.

15. The Illinois Commerce Commission has a pecuniary interest in issuing a citation to the Norfolk Southern on the basis of 92 IAC 1535.205 because the Illinois Commerce Commission previous to the accident were called upon and requested in writing pursuant to a Project Application and written official request to examine and update the subject crossing in compliance with Illinois Commerce Commission standards. The Illinois Commerce Commission either approved the existing crossing configuration and protection, failed to act appropriately, or failed to act at all. The Illinois Commerce Commission is subject to being sued, and a ruling by the Illinois Commerce Commission

that Norfolk Southern was in violation of 92 IAC 1535.205 would greatly serve the Illinois Commerce Commission in reducing its potential liability. This creates a patent and insurmountable pecuniary interest and bias.

16. Requiring a party to submit to a hearing in front of a decision maker, namely the Illinois Commerce Commission, who has a pecuniary interest in the outcome of the decision is a *per se* violation of its due process rights.

17. Statements made by Illinois Commerce Commission personnel clearly indicate that the Illinois Commerce Commission has already made its decision before allowing a Norfolk Southern hearing.

18. Submission to a biased decision making process is a constitutional injury sufficient to constitute irreparable harm, and to warrant injunctive relief.

WHEREFORE, Norfolk Southern Railway Company moves this court as follows:

1. To restrain and enjoin the Illinois Commerce Commission from enforcing a hearing upon Citation for a period of ten (10) days from the date of such order;

2. Upon notice, granting an order restraining and enjoining the Illinois Commerce Commission from enforcing a hearing upon Citation for an additional period, either temporarily or preliminarily;

3. To *preliminarily* enjoin the Illinois Commerce Commission from enforcing an unconstitutionally vague regulation;

4. To preliminary enjoin the Illinois Commerce Commission, from conducting a hearing before a biased decision maker;

5. To grant a permanent injunction enjoining the Illinois Commerce Commission from conducting a hearing to enforce an unconstitutionally vague regulation.

6. To grant a permanent injunction enjoining the Illinois Commerce Commission from conducting a hearing before a biased decision maker;

7. To grant such other and further relief as the Court deems just, including but not limited to, right to a trial by jury, costs and attorneys fees.

COUNT II

Requiring Norfolk Southern to submit to the show cause hearing as noticed by the Illinois Commerce Commission constitutes a violation of Norfolk Southern's Due Process Rights as protected by the Constitution of the State of Illinois, Article 1 § 2.

1. Norfolk Southern repeats and realleges allegations common to all Counts, paragraphs 1 through 13, as though fully set forth herein.

14. Under Illinois State law, any judge has any potentially debilitating personal interest in the outcome of the hearing should not sit in judgment of a case.

15. In addition the pecuniary loss as discussed in Count I, the Illinois Commerce Commission may also suffer great loss of institutional reputation which will result in an insurmountable bias by the ICC in their hearing.

16. Submission to a biased decision making process is a constitutional injury sufficient to constitute irreparable harm, and to warrant injunctive relief, especially where the result of that biased decision making process will cause irreparable harm.

17. The merits of a violation to plaintiff's due process rights by virtue of a biased decision maker are likely, if not patent.

WHEREFORE, Norfolk Southern Railway Company moves this court as follows:

1. To restrain and enjoin the Illinois Commerce Commission from enforcing a hearing upon Citation for a period of ten (10) days from the date of such order;

2. Upon notice, granting an order restraining and enjoining the Illinois Commerce Commission from enforcing a hearing upon Citation for an additional period, either temporarily or preliminarily;

3. To preliminarily enjoin the Illinois Commerce Commission from enforcing an unconstitutionally vague regulation;

4. To preliminary enjoin the Illinois Commerce Commission, from conducting a hearing before a biased decision maker;

5. To grant a permanent injunction enjoining the Illinois Commerce Commission from conducting a hearing to enforce an unconstitutionally vague regulation.

6. To grant a permanent injunction enjoining the Illinois Commerce Commission from conducting a hearing before a biased decision maker;

7. To grant such other and further relief as the Court deems just, including but not limited to, right to a trial by jury, costs and attorneys fees.

COUNT III

92 Illinois Administrative Code Part 1535.205 is void for vagueness and enforcing the regulation constitutes a violation of plaintiff's due process rights as protected by the Constitution of the State of Illinois, Article 1 § 2.

1. Norfolk Southern repeats and realleges allegations common to all Counts, paragraphs 1 through 13, as though fully set forth herein.

14. 92 Illinois Administrative Code Part 1535.205 requires "Every Railroad shall keep its right-of-way adjacent to tracks reasonably clear of brush, shrubbery, trees, weeds, crops, and all unnecessary permanent obstructions such as unauthorized signs and billboards for a distance of at least 500 feet each way from every grade crossing where such things would materially obscure view of approaching trains to travelers on the highway."

15. No definition of the term "reasonably" is contained in the regulation, and there is no indication of what factors are considered when determining what is reasonable.

16. The only distance specified in the regulation is 500 feet, and nothing in the regulation specifies from where this measurement is to be taken. The regulation does state nor explain if this distance is from the crossing itself, from the warning sign, or from some other point.

17. 92 IAC 1535.205 contains no definition of "right-of-way" nor "railroad right-of-way adjacent to its tracks".

18. No definition of the term "materially obscure", or how a determination will be made that something would materially obscure the view.

19. Further, the regulation is vague and unclear as to whose view must be materially obscured for there to be a violation of the regulation.

20. A reasonably intelligent person must guess at the meaning of the regulation due to its vagueness.

21. The Illinois Commerce Commission has further confused the meaning of an already vague regulation by referring to the regulation as a "recommendation" in orders, and by entering

other orders allowing the planting of shrubbery and trees on right-of-ways for purposes of "beautification", so that if a reasonably intelligent person not only read the regulation, but also read Commission Rulings and Orders, he would still have to guess at the meaning of the regulation.

22. The regulation is also in conflict with the companion Illinois statute. 625 ILCS 5/18(c)-7401(3) states that "Every rail carrier operating within the state shall remove from its right-of-way at all grade crossing within the state, such brush, shrubbery and trees as reasonably practical for a distance of not less than 500 feet in either direction from each grade crossing."

23. 92 Illinois Administrative Code Part 1535.205 is in conflict with 625 ILCS 5/18(c)-7401(3) because the regulation requires the railroad to keep its track "reasonably clear of brush, shrubbery, trees, weeds, crops and all unnecessary permanent obstructions such as unauthorized signs and billboards for a distance of at least 500 feet each way" whereas, the statute requires the railroad to remove from its right-of-way at all grade crossings within the state such brush, shrubbery and trees as is "reasonably practical" for a distance of not less than 500 feet in each direction from each grade crossing.

24. The statute does not define what is meant by "practical", or "reasonably practical".

25. Although the language of the statute and of regulation are so vague that a person has to guess at the meanings, it appears that the requirement that the railroad keep its right-of-way "reasonably clear" is in conflict with the requirement that it keep the area of not less than 500 feet in either direction as clear as is "reasonably practical".

26. The statute and the regulation are so vague and conflicted that a railroad would have to guess at what its obligations are with respect to clearing obstructions in the State of Illinois.

27. Because the regulation is in conflict with the language in the statute and are so broad as to require a person of average intelligence to guess at what is meant by the words, allowing the Illinois Commerce Commission to enforce the statute would constitute a violation of Norfolk Southern's Due Process Rights as protected by the Constitution of the State of Illinois.

28. Submission to a hearing on the basis of a regulation which is unconstitutionally vague would be sufficient injury to constitute irreparable harm and to warrant injunctive relief.

WHEREFORE, Norfolk Southern Railway Company moves this court as follows:

1. To restrain and enjoin the Illinois Commerce Commission from enforcing a hearing upon Citation for a period of ten (10) days from the date of such order;

2. Upon notice, granting an order restraining and enjoining the Illinois Commerce Commission from enforcing a hearing upon Citation for an additional period, either temporarily or preliminarily;

3. To preliminarily enjoin the Illinois Commerce Commission from enforcing an unconstitutionally vague regulation;

4. To preliminary enjoin the Illinois Commerce Commission, from conducting a hearing before a biased decision maker;

5. To grant a permanent injunction enjoining the Illinois Commerce Commission from conducting a hearing to enforce an unconstitutionally vague regulation.

6. To grant a permanent injunction enjoining the Illinois Commerce Commission from conducting a hearing before a biased decision maker;

7. To grant such other and further relief as the Court deems just, including but not limited to, right to a trial by jury, costs and attorneys fees

COUNT IV

92 Illinois Administrative Code Part 1535.205 is void for vagueness and enforcing the regulation constitutes a violation of plaintiff's due process rights as protected under the 14th Amendment of the United States Constitution.

1. Norfolk Southern repeats and realleges allegations common to all Counts, paragraphs 1 through 13, as though fully set forth herein.

14. These allegations constitutes a violation of Norfolk Southern's Due Process Rights as protected by the 14th Amendment of the United States Constitution.

15. Submission to a hearing on the basis of a regulation which is unconstitutionally vague would be sufficient injury to constitute irreparable harm and to warrant injunctive relief.

WHEREFORE, Norfolk Southern Railway Company moves this court as follows:

1. To restrain and enjoin the Illinois Commerce Commission from enforcing a hearing upon Citation for a period of ten (10) days from the date of such order;

2. Upon notice, granting an order restraining and enjoining the Illinois Commerce Commission from enforcing a hearing upon Citation for an additional period, either temporarily or preliminarily;

3. To preliminarily enjoin the Illinois Commerce Commission from enforcing an unconstitutionally vague regulation;

4. To preliminary enjoin the Illinois Commerce Commission, from conducting a hearing before a biased decision maker;

5. To grant a permanent injunction enjoining the Illinois Commerce Commission from conducting a hearing to enforce an unconstitutionally vague regulation.

6. To grant a permanent injunction enjoining the Illinois Commerce Commission from conducting a hearing before a biased decision maker;

7. To grant such other and further relief as the Court deems just, including but not limited to, right to a trial by jury, costs and attorneys fees.

COUNT V

Requiring Norfolk Southern to defend itself in a Show Cause Hearing on such short notice constitutes a violation of Norfolk Southern's Due Process Rights Under Article 1 § 2 of the Illinois Constitution and the Fourteenth Amendment of United States Constitution

1. Norfolk Southern repeats and realleges allegations common to all Counts, paragraphs 1 through 13, as though fully set forth herein.

14. Norfolk Southern was mailed a Citation which was received on August 12, 2002.

15. The citation required the Illinois Commerce Commission to show cause why it was an alleged violation of the regulation on August 28, 2002.

16. Requiring Norfolk Southern to prepare and defend itself in a trial-like setting, requiring production of evidence, examination of witnesses, expert testimony and other trial-like requirements without time to properly prepare, constitutes a violation of its due process rights under the 14th Amendment of the United States and the Illinois Constitution.

17. Requiring Norfolk Southern to respond to the citation only 16 days after being mailed a citation, is sufficient basis for the court to warrant temporary injunctive relief.

WHEREFORE, Norfolk Southern Railway Company moves this court as follows:

1. To restrain and enjoin the Illinois Commerce Commission from enforcing a hearing upon Citation for a period of ten (10) days from the date of such order;
2. Upon notice, granting an order restraining and enjoining the Illinois Commerce Commission from enforcing a hearing upon Citation for an additional period, either temporarily or preliminarily;
3. To preliminarily enjoin the Illinois Commerce Commission from enforcing an unconstitutionally vague regulation;
4. To preliminary enjoin the Illinois Commerce Commission, from conducting a hearing before a biased decision maker;
5. To grant a permanent injunction enjoining the Illinois Commerce Commission from conducting a hearing to enforce an unconstitutionally vague regulation.
6. To grant a permanent injunction enjoining the Illinois Commerce Commission from conducting a hearing before a biased decision maker;
7. To grant such other and further relief as the Court deems just, including but not limited to, right to a trial by jury, costs and attorneys fees.

COUNT VI

Requiring Norfolk Southern to Submit to the Show Cause Hearing Will Violate their Constitutional Right to Trial by Jury

1. Norfolk Southern repeats and realleges allegations common to all Counts, paragraphs 1 through 13, as though fully set forth herein.
14. The Illinois Constitution provides a right to trial by Jury.

15. Norfolk Southern has a right to trial by jury on the basis that criminal and civil penalties are potentially allowed.

WHEREFORE, Norfolk Southern Railway Company moves this court as follows:

1. To restrain and enjoin the Illinois Commerce Commission from enforcing a hearing upon Citation for a period of ten (10) days from the date of such order;

2. Upon notice, granting an order restraining and enjoining the Illinois Commerce Commission from enforcing a hearing upon Citation for an additional period, either temporarily or preliminarily;

3. To preliminarily enjoin the Illinois Commerce Commission from enforcing an unconstitutionally vague regulation;

4. To preliminary enjoin the Illinois Commerce Commission, from conducting a hearing before a biased decision maker;

5. To grant a permanent injunction enjoining the Illinois Commerce Commission from conducting a hearing to enforce an unconstitutionally vague regulation.

6. To grant a permanent injunction enjoining the Illinois Commerce Commission from conducting a hearing before a biased decision maker;

7. To grant such other and further relief as the Court deems just, including but not limited to, right to a trial by jury, costs and attorneys fees.

GUNDLACH, LEE, EGGMANN, BOYLE & ROESSLER

By: 

Charles J. Swartwout

Andrew C. Corkery

Attorney for Norfolk Southern Railway Company

5000 West Main Street, Box 23560

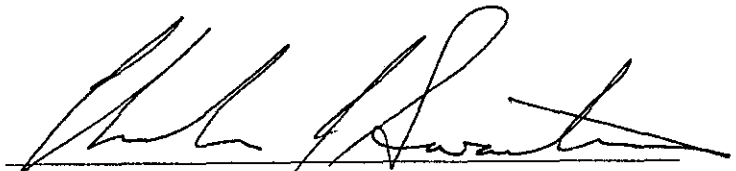
Belleville, IL 62223-0560

AFFIDAVIT OF COUNSEL

COMES NOW the Affiant, CHARLES J. SWARTWOUT, and first being duly sworn upon his oath deposes and states:

1. That the statements made in the Complaint for Temporary, Preliminary and Permanent Injunctive Relief, are true and correct to the best of my knowledge and belief.

DATED: August 26, 2002


Charles J. Swartwout

STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

Subscribed and sworn before me this 26th day of August, 2002.




NOTARY PUBLIC

PROOF OF SERVICE

The undersigned certifies that a copy of the attached document was hand-delivered on August 26, 2002 to Kevin Sharpe, Director of Processing and Information, Illinois Commerce Commission, at their office at 527 East Capitol Avenue, Springfield, Illinois 62701 and further certifies that a copy of the attached document was faxed to Richard Mathias, Chairman, Illinois Commerce Commission, 160 North LaSalle Street, Chicago, IL 60601 at FAX NO: 312-814-5710.

Charles J. Swartwout